Kluwer Copyright Blog

On the necessity of filtering online content and its limitations: AG Saugmandsgaard Øe outlines the borders of Article 17 CDSM Directive

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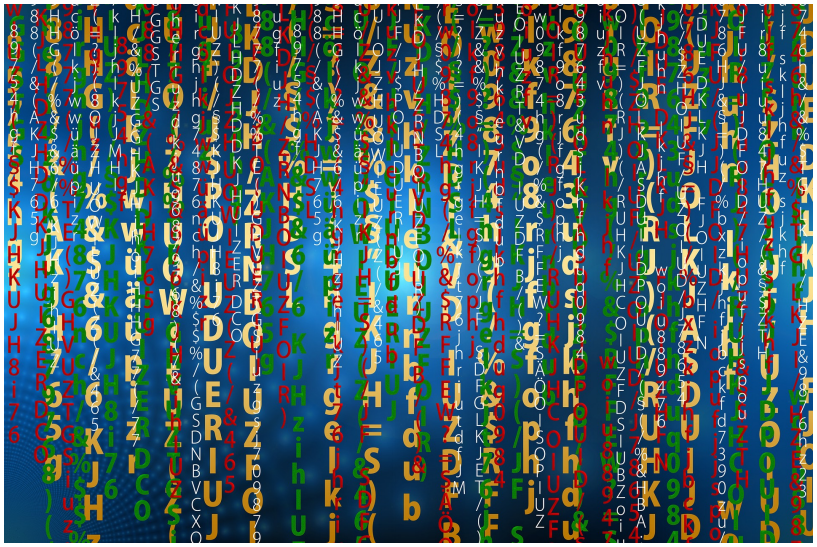

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In its long-awaited Opinion on an action brought by Poland to annul certain parts of Article 17 of the Directive on copyright and related rights in the Digital Single Market (CDSM Directive), Advocate General (AG) Saugmandsgaard Øe demarcates the borders of permitted filtering of users' uploads. If followed by the Court of Justice of the European Union (CJEU), the Opinion will be the key to providing a reasonable model to implement and apply this highly contested provision.

Article 17 of the CDSM Directive has been hotly debated over the last few years (see contributions on this blog here). It marks a significant departure from the liability regime for a certain class of online hosting providers, so-called online content-sharing service providers (OCSSPs). Its complex structure and thorny implications have attracted the attention of scholars, practitioners, and stakeholders (see e.g. here, here, and here). While Member States started struggling with its implementation (see e.g. here), the Commission published its Guidance in early June (see here, here, and here), all whilst the Court of Justice was deliberating whether parts of Article 17 violate EU fundamental rights.

In 2019, the Polish Government filed an action for annulment with the EU's highest court. The Polish government argues that the obligations established by Article 17(4)(b) and 17(4)(c) *in fine* violate Article 11 of the EU Charter of Fundamental Rights (EU Charter). Poland argues that these provisions effectively require OCSSPs to install monitoring and filtering technology that would prevent lawful uploads and thereby undermine the essence of the right to freedom of expression.

In his Opinion, delivered on 15 July 2021, the AG does not suggest, as many had hoped and argued in favor of (see here and here), that Article 17 should be annulled. While advising the CJEU to dismiss Poland's action, however, he carefully sets strict boundaries for the implementation and application of Article 17, outside of which the provision would, arguably, not be in compliance with EU fundamental rights.

This post looks at the reasoning of the AG, while a forthcoming post, authored by Julia Reda and Paul Keller will examine the compatibility of the Dutch and German models were the CJEU to follow the AG.

Article 17 implies a *specific* obligation to filter online content

The Opinion starts from the premise that Article 17 necessitates some sort of filtering of users' uploads. Changes in the way we use online platforms and the sheer number of users' uploads which cannot possibly be checked manually by OCSSPs make filtering a practical and inevitable necessity. Moreover, the AG argues that the notice-and-takedown regime that governed copyright enforcement under the E-Commerce Directive cannot be upheld because it disproportionately burdens rightholders who would have to chase infringers themselves. This change in circumstances justifies a shift of responsibility to online service providers and, in particular, to OCSSPs to step in and help secure a copyright-respectful online environment. In this regard, to comply with the obligation to make 'best efforts' and conform with 'high industry standards of professional diligence' it is likely that advanced filtering and content-recognition technologies will have to be employed by OCSSPs.

Naturally, any form of filtering will conflict with the right to freedom of expression online. The AG constructs its argument portraying Article 17 as a serious restriction to Article 11 of the EU Charter. Filtering and blocking the upload of content that contains, or even entirely consists of, protected subject matter constitutes a constraint to the exercise of this fundamental right.

In this vein, the AG illustrates how not all filters are good filters. Any obligation to preventively monitor in a general manner users' uploads on an online sharing platform would, in fact, constitute a restriction of freedom of expression that would go to the 'essence' of that fundamental right (see here). Such a restriction would be impossible to justify. The AG even elevates the general prohibition to monitor to a "*general principle* of law governing the Internet" which is essential to safeguard the fundamental freedom of communication online. However, the AG considers the obligations arising under Article 17(4) CDSM Directive as 'specific' monitoring obligations. He takes a realistic view, suggesting a departure from earlier case-law of the CJEU (e.g. *Scarlet Extended*, *SABAM v Netlog* and *Mc Fadden*), in which the Court had rejected the possibility of general monitoring obligations that would monitor all the transmissions within a network. Building on the recent judgment in *Glawischnig-Piesczeck*, which marks a turn in the Court's case-law, the AG suggests that the 'generality' of an obligation will not have to be determined by the amount of information processed, but by the specific content that is being looked for in the information surveyed. Any other conclusion would "regrettably amount to ignoring the technological developments" and potentially frustrate efficient means to combat online infringements.

The proportionality of online filters and the risk of over-blocking

The heart of the AG's reasoning lies in his proportionality analysis. After having established that filtering is inevitable and specific filtering legitimate, he turns his attention to the question of how

filtering should be conducted.

The AG acknowledges the *appropriate* nature of Article 17 highlighting how it meets an objective of general interest in the EU, which is to ensure the effective protection of rightholders in the exercise of their intellectual property rights. The more problematic aspect is whether the measures adopted are *necessary*, i.e. whether a less restrictive measure could have been adopted. The relevant provisions challenged by the Polish government are Article 17(4)(b) and (c) which, if annulled, would reduce Article 17(4) to a notice-and-takedown system as already operated under the E-Commerce Directive. Even though less restrictive of the users' freedom of expression, this would, as the AG states, not be as effective as a system based on monitoring obligations imposed on the online sharing services.

Such monitoring must be conducted in a *proportionate* way, which is what the AG describes in the remainder of his Opinion. The starting point of the analysis is again the changing digital environment, which legitimizes and justifies a change in the balance of intermediary liability for OCSSPs from a mere notice-and-takedown system to one that makes them primarily liable for users' uploads and supplements this obligation with certain monitoring and filtering obligations to ensure the effective protection of rightholders. Laudably, the AG refers to the various fundamental rights involved, including the right to conduct a business and the property rights of rightholders which must be measured against the right to freedom of expression of platform users.

Assessing the proportionality between the aims and effects of Article 17 leads the AG to fundamentally highlight its dangers. Automated filtering with content-recognition technology not only effectively prevents copyright infringements, but potentially causes the preventive blocking of lawful uses. As the AG emphasizes, such technologies are context-insensitive, thus cannot possibly distinguish between infringing uses and uses that are, for example, covered by a copyright exception or limitation. The "inherent limitation" of such tools, which "detect *content* and not copyright *infringements*", will certainly result in the initial unavailability of lawful uploads.

Against this, the Directive itself foresees certain safeguards. A criticism that has been levelled against Article 17 is that such safeguards are not precise enough, at least as they have been formulated in the wording of the CDSM Directive itself. Since any limitation of fundamental rights in the EU should "at the very least" be defined in its substance and due to the highly technical nature of the matter, the AG argues that it is necessary for certain aspects of these safeguards to be defined by the Member States while implementing Article 17 and by the Commission.

The AG stresses that the guarantee that lawful uses must be permitted is a substantive safeguard. This is bolstered by the finding that in Article 17(7) the EU legislator has recognized such uses as "subjective rights under copyright law", including certain exceptions (i.e. parody and quotation) which, for this reason, have been made mandatory. Safeguarding the exercise of these users' rights is an obligation of result which takes precedence over the obligations of effort imposed on OCSSPs under Article 17(4). This hierarchy suggests that ex ante blocking of content, and thereby the potential prevention of lawful online uses, is not proportionate. Neither can ex ante blocking be mitigated by ex post complaint and redress mechanisms. Rather, such mechanisms are part of the users' safeguards that apply simultaneously, where the second (complaints mechanism) supports the former (prohibition of ex ante filtering) if this were to fail. It is also interesting to note here how the AG underlines that the efficiency and speed with which the users' complaint mechanisms must operate must be equivalent to the standards that apply to notice-and-takedown mechanisms available for rightholders. On an additional note, the presence of out-of-court dispute settlement

mechanisms would desirably buttress the protection of the users' fundamental right to an efficient judicial remedy (see *UPC Telekabel Wien*).

The suggested balance: filtering only manifestly infringing or equivalent content

The AG's reasoning continues emphasizing that the collateral effects of filtering and blocking measures must be minimal. Admitting that absolute effectiveness of such measures is not possible, he cautions against an overly relaxed approach which could create severe chilling effects on freedom of expression. In this context, the AG also underlines the importance of speedy operations in the digital environment and the detrimental effects of preventive blocking on the flow of information online. Approaching the conclusions, the AG repeats that Article 17, as a whole, includes two cumulative obligations OCSSPs incur: (i) that of preventing uploads that unlawfully contain protected subject matter, and (ii) that not to prevent lawful uploads.

After tracing the limitations of Article 17 meant to minimize the risk of the disproportionate disadvantages borne by the users, the AG finally embraces the rightholders' and intermediaries' perspectives, providing a more detailed account of the prohibition of general monitoring laid down in Article 17(8). Such monitoring, and therefore the obligations for OCSSPs, should be limited to *manifestly infringing or equivalent content*. This should avoid over-blocking of potentially lawful content, but also prevent OCSSPs having to make decisions on the lawfulness of users' uploads. By drawing an analogy to the CJEU ruling in *Glawischnig-Piesczeck* on the viability of specific blocking injunctions, the AG reminds that only uploads which reproduce identically or with minor alteration subject matter identified by rightholders would fall under the obligation to prevent the making available of unlawful content. Such uploads would be presumed to be unlawful, while all other uploads would benefit from a presumption of lawfulness. Consequently, the AG concludes that the assessment of uploads that are not manifestly infringing, including, in particular, transformative uses, must be conducted by a court.

This is a particularly interesting statement because it seems to reduce the role of platform-based dispute settlement mechanisms, which seem to lack legitimacy. In the same vein, the AG argues that practical solutions for measures to be taken by OCSSPs in relation to different types of subject matter must also be defined in cooperation between stakeholders, under the supervision of a public authority. This, again, alludes to the stakeholder dialogue, whose results were only published a few weeks before this Opinion was published. In an (as far as these authors are aware) unprecedented Postscript to the Opinion, the AG briefly states that the outcomes of the stakeholder dialogue do not change anything in his interpretation of Article 17, but he fervently rejects the proposition of the Commission that a specific category of 'earmarked' economically valuable, time-sensitive content, could be subject to ex ante blocking with ex post human review.

Comment

The Opinion of AG Saugmandsgaard Øe is incredibly dense and it should suffice here, after a first reflection, to highlight three points that are remarkably useful for further discussion (See also critically here and here). First, the AG categorically excludes ex ante blocking of users' uploads unless the uploaded content is manifestly infringing. Blocking of any other type of material would unnecessarily restrict the right to freedom of expression of Internet users. Doubts remain on the potentially volatile meaning of "equivalent" uploads. Essentially, following a line of cases that started with *FAPL/Murphy*, the AG rejects the notion of absolute protection of the intellectual property of rightholders, and proposes a reasonably fair solution that has a more restrictive flavor

than the guidance issued by the Commission on 4 June 2021.

Second, the AG establishes a strong position for end-users by confirming that they enjoy subjective rights to make legitimate use of protected content (also) over the Internet. This trend is bolstered by regular references to the importance of taking specific aspects characterizing the evolving digital environment into consideration while interpreting EU copyright rules and, in particular, while balancing the protection of exclusive rights vis-à-vis freedom of expression (see also here).

Third, the AG is highly sceptical of the suitability of OCSSPs to adjudicate on borderline copyright infringement cases. He prefers to situate the dispute settlement mechanisms that rule on the lawfulness of non-manifestly infringing uploads with the courts, which have the necessary independence and expertise to rule on such matters.

Should the CJEU follow the AG's attempt to dress Article 17 in a tight corset of conditions to safeguard compliance with EU fundamental rights, the practical relevance of such decision would be cautiously promising. What would be expected is a technological course of action focused on developing *some* filtering mechanisms to filter out only manifest infringements from the main online sharing services. Drawing the line between prima facie copyright violations and borderline cases (e.g. short extracts, transformative uses, adapted works) would remain the usual dilemma, which would blur the division of labor and adjudication competence between OCSSPs and national courts.

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